Supreme Court, U.S.
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No. 92-693

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

WARD G. HALL, SR.,

Petitioner,

v.

CITY OF STUART, FLORIDA
BUILDING & ZONING DEPARTMENT,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Court of Appeals' affirmance of the District Court's Final Summary Judgment departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Opinion of the Court of Appeals is not reported. The decision is reflected in Case No. 91-3426, Non-Argument Calendar, in the United States Court of Appeals for the Eleventh Circuit (App.3).

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1992 (App.1). The Petition for Writ of Certiorari was filed on September 21, 1992. The jurisdiction of this Court is invoked under *28 U.S.C. §1254(1)*.

STATEMENT

The Respondent objects to the Petitioner's Statement of the Case as incorrect, inaccurate and incomplete. Petitioner filed a two count "Amended Complaint" for damages (R.8). Each count was based on the alleged civil rights violations by the Respondent pursuant to *42 U.S.C. §1983*. Count I claimed the destruction of Petitioner's property without due process and Count II was based on allegations that the destruction of Petitioner's property was

racially motivated.

Petitioner, however, is not the owner of the property. [1]/ The record owner of the property is an Association which was never made a party to the proceedings in the District Court or in the appellate court. Petitioner is the mortgagee. The condemnation notices as well as the building permit set forth information relative to time limits, appeals, demolition and liens. The Petitioner personally saw the condemnation notice which prompted him to seek the building permit, and personally applied for and received the building permit on behalf of the owner-Association. The City followed its own Code provisions and ordinances governing unsafe buildings. The Magistrate Judge's report specifically found that the Petitioner

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[1]/ The factual statements in this paragraph are taken directly from the Magistrate Judge's twenty-eight page Report and Recommendations (App.14).

made no claim of any special disability (such as a lack of fluency in English) which would give rise to any issue as to the adequacy of the "notice" (App.14).

Petitioner fails to state that police and photographic documents submitted to the appellate court through a "Motion to Supplement" had not been submitted to the District Court at the time the motion for summary judgment was pending. [2]/ The motion to supplement was denied by order of the Eleventh Circuit Court of Appeals on June 23, 1992 (App.7).

The Petitioner incorrectly states that the issue of racial discrimination was not addressed by the District Court in its Final Summary Judgment. The Magistrate Judge specifically recommended that the District

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[2]/ The documents were listed on the pre-trial catalog and were intended to be used at trial (R.36) but were never submitted to the District Court.

Court "should grant the [respondent's] motion for summary judgment on Count II because the [petitioners'] have not provided any evidence of conspiracy to violate their civil rights or any evidence of racial discrimination." The District Court reviewed the Magistrate Judge's report, *de novo*, together with the Petitioner's objections to the report, and the record, before making the Magistrate's findings and recommendations an order of the District Court (App.12). The Eleventh Circuit panel specifically reviewed whether or not there was any evidence of a racially motivated conspiracy. The Eleventh Circuit found that the "plaintiffs have entirely failed to identify any evidence in the record that would indicate genuine issues for trial. Because plaintiffs had no facts suggesting that they were treated differently than other, similarly-situated property owners in the City, the district court correctly ruled

that the City was entitled to judgment as a matter of law (App.3)."

ARGUMENT

I. THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S FINAL SUMMARY JUDGMENT IS NOT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO REQUIRE THIS COURT'S POWER OF SUPERVISION

Petitioner argues that the actions of the Respondent were inadequate to assure Petitioner "procedural due process" before the demolition of the property upon which he holds a mortgage. Petitioner's argument, however, as well as his cause of action, is that he did not specifically receive the notice and information mailed by the Respondent City. Petitioner contends that the record contained sufficient factual conflicts as to whether or not he received notice to have successfully avoided a final

summary judgment.

The second part of Petitioner's argument relates to the issues of racial discrimination. Petitioner contends that his exhibits contained sufficient inferences to carry his burden of proof that the Respondent engaged in a conspiracy to destroy Petitioner's property because of Petitioner's race.

Both these contentions raise no issues warranting review by this Court.

There is no conflict in the law and its application relied upon by the Petitioner and the law relied upon by the District Court in granting Respondent's motion for final summary judgment or the law relied upon by the Eleventh Circuit Court of Appeal in affirming the final summary judgment.

The District Court referred Respondent's Motion for Summary Judgment to the Magistrate Judge pursuant to *28 U.S.C. §636(b)(1)(B) (App.8)*.

The Magistrate Judge found, not only that the Petitioner had not plead the necessary elements for a civil rights claim against Respondent, *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), but had failed to produce any proofs or provide any evidence of a municipal policy of condemnation and demolition of property without notice and for racial motives. The Magistrate Judge also considered the "due process" claim and factually determined that Respondent's established procedure for condemnation and demolition of property satisfied the requires of *Sinaloa Lake Owners Ass'n v. Simi Valley*, 882 F.2d 1398 (9th Cir. 1989) (App.14). After a complete review of the record, the District Court entered an order (App.12) affirming the findings and recommendations of the Magistrate Judge and entered a Final Summary Judgment (App.10).

On appeal to the Eleventh Circuit, the decisional panel again reviewed the record in light of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and based on the established law of *Monell v. Department of Social Services*, 436 U.S. 658, 98 s.Ct. 2018, 56 L.Ed.2d 611 (1978), determined that Petitioner failed "to identify any evidence in the record that would indicate genuine issues for trial." (App.3)

Respondent, CITY OF STUART, respectfully contends that there was no departure from the accepted and usual course of proceedings by the District Court in granting Respondent's motion for final summary judgment or by the Eleventh Circuit Court of Appeals in affirming the final summary judgment that would require review by this Court.

♦

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 91-5426
Non-Argument Calendar

D. C. Docket No. 89-14174-CIV-JAG

JANELLE C. COOK,
WARD G. HALL,

Plaintiffs-Appellants,

versus

CITY OF STUART, FLORIDA
BUILDING & ZONING DEPT.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before EDMONDSON, COX and BIRCH, Circuit Judges.

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 23, 1992
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: JUL 15 1992

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5426
Non-Argument Calendar

D. C. Docket No. 89-14174-CIV-JAG

JANELLE C. COOK,
WARD G. HALL,

Plaintiffs-Appellants,

versus

CITY OF STUART, FLORIDA
BUILDING & ZONING DEPT.,

Defendant-Appellee.

Appeal from the United States District Court
Southern District of Florida

(June 23, 1992)

Before EDMONDSON, COX and BIRCH, Circuit Judges.

PER CURIAM:

In this appeal, the plaintiffs, challenge the district court's grant of summary judgment in favor of defendant City of Stuart, Florida, Building and Zoning Department ("City"). In their complaint the plaintiffs alleged that the City violated 42 U.S.C. § 1983 (1988) by discriminating against them on the basis of their race. Count one of the complaint alleged that the City engaged in racial discrimination when it purportedly destroyed the plaintiffs' building without proper notice. Count two contented that unnamed City conspirators engaged in a racially motivated plan to deprive the plaintiffs of their property

rights. After full discovery and the assistance of a magistrate judge, the district court granted summary judgment to the City because the plaintiffs had provided no evidence of a discriminatory City custom or policy and no evidence of a racially motivated conspiracy. We **AFFIRM.**

The City clearly met its Fed. R. Civ. P. 56 burden of showing that the plaintiffs lacked any evidence in support of their case. Upon this showing, the plaintiffs were required to demonstrate specific facts that indicated genuine issues for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed. 2d 265 (1986); Eberhardt v. Waters, 901 F.2d 1578, 1580 (11th Cir. 1990). The plaintiffs failed to meet this burden. The plaintiffs, have not identified any evidence of a discriminatory City custom or policy, as required to hold a municipality

liable for section 1983 violations. See Monell v. Dep't of Social Servs., 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56-L.Ed.2d 611 (1978). Indeed, the plaintiffs' amended complaint does not even allege that such customs or policies exist. Nor have the plaintiffs designated any evidence in support of their claim that there was a racially motivated City conspiracy. The plaintiffs' reliance upon bare allegations and unsubstantiated rhetoric is insufficient at the summary judgment stage. See Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir. 1986).

The plaintiffs have entirely failed to identify any evidence in the record that would indicate genuine issues for trial. Because the plaintiffs had no facts suggesting that they were treated differently than other, similarly-situated property owners in the City, the district court correctly ruled that

the City was entitled to judgment as a matter of law.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5426

JANELLE C. COOK,
WARD G. HALL,

Plaintiffs-Appellants,

versus

CITY OF STUART, FLORIDA
BUILDING & ZONING DEPT.,

Defendant-Appellee.

On Appeal from the United States District Court for
the Southern District of Florida

O R D E R:

Appellants' motion to supplement the record with police and photographic documents is DENIED.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANELLE C. COOK, et al.,

Plaintiffs,

v. CASE NO.89-14174-CIV-GONZALEZ

CITY OF STUART, FLORIDA
BUILDING AND ZONING DEPARTMENT,

Defendant.

ORDER OF REFERRAL TO UNITED STATES MAGISTRATE

THIS CAUSE has come before the Court upon the defendant's motion for summary judgment.

The Court has reviewed the motion and the record, and being otherwise duly advised, it is hereby:

ORDERED AND ADJUDGED that pursuant to 28 U.S.C. §636(b)(1)(B) the defendant's motion is referred to United States Magistrate Judge

Lurana S. Snow for further proceedings, including report and recommendation concerning the disposition of the motion.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 31st day of January, 1991.

JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: Hon Lurana S. Snow
Kenneth P. Carman, Esq.
Janelle Cook

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANELLE C. COOK, et al.,

Plaintiffs,

v. CASE NO.89-14174-CIV-GONZALEZ

CITY OF STUART, FLORIDA
BUILDING AND ZONING DEPARTMENT,

Defendant.

FINAL JUDGMENT

In accordance with this Court's order granting defendant's motion for summary judgment on all claims of the plaintiffs' complaint, it is hereby:

ORDERED and ADJUDGED that final judgment be and the same is hereby entered in favor of the defendant City of Stuart, Florida Building and Zoning Department and against the plaintiffs Janelle Cook and Ward Hall, Sr.,

the plaintiffs to take nothing and the defendants to go hence without further day. The Court will retain jurisdiction over litigants for the purpose of considering any post-judgment motions.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 20th day of May, 1991.

JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: Kenneth Carman, Esq.
Janelle Cook
Ward Hall, Sr.

FINAL ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANELLE C. COOK, et al.,

Plaintiffs,

v. CASE NO. 89-14174-CIV-GONZALEZ

CITY OF STUART, BUILDING & ZONING DEPARTMENT,

Plaintiff.

ORDER

THIS CAUSE has come before the Court upon the report and recommendation of the Honorable Lurana S. Snow, United States Magistrate Judge, dated March 27, 1991. The defendant had moved for summary judgment. Magistrate Judge Snow has recommended the Court grant the defendant's motion. The plaintiffs have filed objections to Judge Snow's report.

Having reviewed, de novo, the Magistrate

Judge's report of March 27, 1991, the plaintiffs' objections to the report, and the record, and being otherwise duly advised, it is hereby:

ORDERED and ADJUDGED that the above-mentioned order of the Magistrate Judge be ratified, affirmed, and made the Order of the District Court. The defendant's Motion for Summary Judgment is **GRANTED**. The defendant shall file and order of final judgment for entry in this regard within twenty (20) days of the date of this order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 30th day of April, 1991.

JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: Lurana S. Snow
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-14174-Civ-GONZALEZ

JANELLE C. COOK, et a., :

Plaintiffs, :

vs. :

CITY OF STUART, BUILDING AND ZONING DEPARTMENT, :

Defendant. :

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the defendant's motion for summary judgment and was referred to United States Magistrate Judge, Lurana S. Snow, for report and recommendation.

PROCEDURAL HISTORY

The pro se civil rights complaint against the City of Stuart, Florida Building and Zoning Department was filed November 1, 1989

(Docket Entry 1). After dismissal of the complaint for lack of proper service (Docket Entry 7), an amended complaint was filed March 30, 1990 (Docket Entry 8). The answer was filed May 3, 1990 (Docket Entry 11).

The Defendant filed the motion for summary judgment on November 2, 1990 (Docket Entry 28); the plaintiffs' response was filed November 29, 1990 (Docket Entry 30).

FACTS ALLEGED

The amended complaint (hereinafter "complaint") alleges that on September 12, 1989, the defendant entered onto private property, demolished the building situated thereon and cleared the land without notice to the plaintiffs, who own the property. The plaintiffs state they received no written or verbal notice that the property was being condemned before a condemnation notice was posted on the property. The plaintiffs saw

the notice on November 3, 1988, and immediately met with a code enforcement officer, O'Neil, to discuss the condemnation. The complaint alleged O'Neil stated that he had mailed a notice but it had been returned as undelivered. The plaintiffs supplied an updated address.

At the meeting, they explained that the property was the subject of a lawsuit in state court, but the plaintiffs would repair the structure to conform to the relevant codes. O'Neil agreed to permit the repairs and suggested the plaintiffs keep the condemnation notice posted on the property to help prevent trespassing.

The repairs were begun, but the house was subsequently demolished without notice to the plaintiffs, the mortgage holder, or the Hedge Highway Evangelistic Association, Inc. (hereinafter "the Association," the owner of

record of the property.)

Count I asserts a violation of the plaintiffs' civil rights pursuant to 42 U.S.C. §1983, owing to the destruction of the property without proper notice.

Count II alleges violation of the plaintiffs' civil rights pursuant to 42 U.S.C. §1983, owing to a racially motivated conspiracy to effect the malicious or negligent destruction of a boarding house.

The plaintiffs request compensatory damages and damages for emotion distress.

MOTION FOR SUMMARY JUDGMENT

The defendant's motion for summary judgment contends that the plaintiffs have no standing to file a lawsuit regarding the property; that they have named an improper defendant; that property rights involving pecuniary loss cannot form the basis for a civil rights action; that the matter is not

ripe for federal review because the plaintiffs have failed t exhaust their state law remedies; that there is no showing that the incident was the result of established municipal policy or custom; that the necessary due process was afforded the plaintiffs, and that there is no evidence of racial discrimination.

In support of these arguments, the defendant filed O'Neil's deposition and several exhibits.

During the deposition, O'Neil stated that when he first saw the premises, the doors were open, the plumbing had been vandalized, the wiring was faulty, windows were broken, and part of the floor was missing (p. 37). Although he was in the neighborhood to inspect another property, the condition of the plaintiffs' property mandated an inspection

(pp. 36-37).

O'Neil testified that a notice of condemnation had been mailed to the Association; O'Neil received a signed return receipt dated November 4, 1988 (p. 7; see also Exhibit 1). O'Neil did not know what record had provided the address to which the notice was mailed (2239 Flamingo Terrace, Jensen Beach, FL 33457)(p.16, and defendant's Exhibit 1).

O'Neil testified that the City regulations did not require separate notice of demolition and that the plaintiffs had notice of the condemnation when they came to his office on October 3, 1988 (p. 31).

O'Neil also testified that a title search had been made prior to the demolition of the building but he was not aware of a mortgage holder. O'Neil believed that notice of the

demolition was mailed on May 24, 1989, to the owner listed on the tax roll and also was inserted in the newspaper, but he did not personally do either, and had no record of those notices (pp. 11-12). He remembered that the mailed noticed of demolition was returned undelivered (p.31).

There was no attempt made to obtain the address of the Association from the Secretary of State (p. 15). Defendant's Exhibit III is an affidavit from a title search company stating that the property was deeded to the Association by a quitclaim deed filed February 19, 1985.

O'Neil stated that during the November 3, 1988, meeting the plaintiffs submitted an application for a building permit for repairs to the property (p. 34). The permit was issued the same day (p. 35) in the name of the Association, although the plaintiffs requested

a permit in the name of plaintiff Cook, a bishop in the church (p. 34). The address of the Association listed on the permit was 5755 Southeast Green Lane, Stuart, Florida (p. 35).

The building permit had a time limit of six months if there was no active work performed, and was valid for the length of construction if the work was ongoing (p. 19). Prior to the September 1989 demolition, O'Neil observed that the doors again were open, the plumbing disconnected, the flooring removed, and the wiring unchanged. Bars had been added to some of the windows, but the building contained clothing, trash and food debris (p. 41).

The demolition decision was made by O'Neil and another employee of the Building Department, Mr. Kearney. A second notice of condemnation was posted on the property prior to the demolition (p. 45).

Exhibit I is a copy of a condemnation notice for the subject property, dated November 1, 1988, which lists the owner as the Association, with a Jensen Beach address. The notice is a form which lists various deficiencies; all are checked off for this property:

> Property unsecured and readily available to trespassers.
>
> Plumbing and plumbing fixtures, including bathroom facilities, sinks and running water.
>
> Electricity and electrical fixtures.
>
> Heat and ventilation.
>
> Rodent-proofing and water-tightness.
>
> Foundations.
>
> Walls, windows.
>
> Doors and door frames.
>
> Roof.
>
> Stairways and porches.

The notice also states that the owner has 30 days to botain a building permit and begin

renovation, or may appeal the condemnation within 10 days. If the condemnation is not resolved in 60 days, the City of Stuart will demolish the building and assess the expense as a lien against the property. The notice is signed by O'Neil.

Exhibit II is the City Manager's affidavit stating that the City of Stuart is the only entity capable of being sued, there is no separate entity known as the City of Stuart, Florida, Building and Code Enforcement. The affidavit also states that condemnations are performed in accord with the City's ordinances; there is no custom or policy to the contrary which allows condemnation without notice or for racially discriminatory reasons.

The Stuart City Charter §11 states that the City of Stuart is governed as provided in the charter; the governing body is the City

Commission (Exhibit IV).

Exhibit V is a coy of article XV of the Stuart Code governing unsafe buildings. Section 6-512 requires delivery of written notice of an unsafe building to the owner and the tenant or other person in possession, the mortgagee and the other persons or entities having an interest in the property. Their addresses shall be obtained from the latest tax records; a title certificate also shall be ordered. If these individuals cannot be found on the premises after reasonable search or inquiry, notice of the unsafe building may be posted on the property and also published in the newspaper as provided. The notice must also inform the owner of the right to appeal.

Section 6-514 provides that 60 days after the notice is posted or served, if there is no appeal and if the owner has failed to take such steps as to render the building no longer

unsafe, the building official shall make such report to the City Manager. Thereafter the City Manager decides if the building should be demolished, remain vacant or be secured, and takes steps to enforce the decision. Section 6-515. [The Court notes that there is no requirement that the City Manager provide any notice to owners or others of his decision.] The total costs of the demolition and the steps leading thereto are then assessed as a lien against the property. Section 6-516.

Exhibit VI is an affidavit from City Commissioner Christie, which states that the City Commission has enacted ordinances regarding the condemnation of unsafe and unsecured property. There is no policy or custom allowing condemnation of property without notice to the legal owners; in no instance has that occurred. Additionally, condemnations are not instituted based on race

and no such policy or custom has been authorized. Christie stated that as a black member of the City Commission he is particularly sensitive to the needs of black constituents.

Exhibits VII through x are the affidavits of City Commissioners Jefferson, Krauskopf - who is also Mayor, Arnold and Walson. These affidavits repeat Christie's statements that condemnations are not instituted without notice or on the basis of race; the City Code governs and there is no policy or custom to the contrary.

The plaintiffs responded to the motion for summary judgment with a number of exhibits. In support of their naming the City of Stuart Building and Code Enforcement Board as the defendant, the plaintiffs supply a copy of the City of Stuart, Building and Code Enforcement listing in the telephone book

(Docket Entry 30, Exhibit B).

In support of their standing as plaintiffs, they have provided a copy of plaintiff Cook's December 1985 final judgment of dissolution of marriage which voided the February 18, 1985, quitclaim to the Association and awarded Cook exclusive possession of the property (Exhibit C, p. 4 paras. 4 and 6(d)).

The plaintiffs also provided a February 11, 1985, mortgage deed on the property in favor of plaintiff Hall signed by plaintiff Cook (Exhibit D). The incorporated interest-free note is repayable as a lump sum on December 31, 1993 and is secured by the mortgage. The mortgage gives the mortgagee power to foreclose on the property if the underlying note or any other sum related to the property, such as taxes, is not paid. The mortgage bears a State of Florida documentary

stamp dated February 12, 1985, and is recorded in the Martin County records in Book 627, pages 691-94. This mortgage was also voided by the final judgment of divorce (Exhibit C, p. 4, para. 3)

However, Florida's Fourth District Court of Appeal ruled that Cook's ex-husband had no standing to ask the circuit court to void the quitclaim deed and the mortgage deed, and specifically found that the trial court could not affect the Association's title or Hall's mortgage since neither the Association nor Hall was a party to the divorce proceedings. On October 9, 1987, the court of appeal reversed those sections of the final judgment (Exhibit E).

Regarding the matter of notice, the plaintiffs offered a November 11, 1990, statement from the Jensen Beach Post Office: "There is no record on file @ the Jensen Beach

Post Office of article #P659683669 Being Received - Regular Forward had expired @2239 SE Flamingo Terrace - Undeliverable as addressed /s/ KR Flaum Sr." (Exhibit F). On July 31, 1987, Hall applied for a Post Office box in Jensen Beach (Exhibit G), after the property at 2239 Southeast Flamingo Terrace was seized by the Sheriff on a writ of possession (Exhibit H).

A 1989 proposed tax bill for the subject property shows the owner as Hedge Highway Evangelistic Association, 5755 SE Green Lane, Stuart FL 34997 (Exhibits J, J-1). The November 3, 1988, application for a building permit lists the owner as the Association, 5755 SE Green Lane, Stuart, FL 34997, signed by Bishop Hall for the Association (Exhibit K). The permit states that permit applications for proposed work shall be considered abandoned six moths after the date of filing.

Exhibit L is a July 1989 letter from the Florida Department of State which states that the Association, at the Stuart address, has certificate of status number 730690.

A computer print out from the Stuart Police shows a call to the premises August 31, 1989 at 1312 hours (Exhibit M).

A receipt dated April 1, 1988, indicates that Mrs. Cook paid a painting contractor $555 to clean four properties, including subject property (Exhibit Q). Eight window grates were paid for on November 10, 1988 (Exhibit R).

Exhibit I is a copy of a hand-dated sender's portion of a certified mail number allegedly attached to a notice of condemnation sent to the owners of another property in Stuart, the Woodman Hall Building. The plaintiffs contend that since there is no return receipt on file for this condemnation

notice, there is a policy of not mailing notices. They assert that the signed return receipt on file for their property is suspicious. Additionally, the memorandum of law alleges that the Woodman Hall Building had not been demolished as of November 1990, even though the condemnation notice is dated July 10, 1989. They argue that the rapid demolition of their property was obviously racially-motivated.

Plaintiff Cook's affidavit (Exhibit S) states that she is the owner of the subject property by virtue of the December 1985 final judgment of dissolution of marriage and the reversal of the judgment by the Fourth District Court of Appeal. The property first belonged to her late father. Cook avers she holds one of two interests in the property.

The affidavit states that Cook was present at the November 3, 1988, meeting with

plaintiff Hall and O'Neil. At that meeting O'Neil did not provide any written guidelines for making the building conform to the code, did not show them the condemnation notice, did not tell them of the right to appeal, and did not mention demolition. Cook also avers that O'Neil stated that the mailed notice of November 1988 had been returned undelivered.

The affidavit continues that O'Neil refused to accept Cook's assertion that the property belonged to her and that she intended to change the deed to show the property was no longer owned by the Association. O'Neil insisted that the permit be issued to the Association to expedite matters, since the notice of condemnation was issued in that name. O'Neil also stated that the building was structurally sound.

Cook states that plaintiff Hall moved from Jensen Beach in July 1987.

Plaintiff Hall's affidavit (Exhibit T) states he is the mortgagee of the property and one of the two parties of interest in this action. Hall, as Bishop of the Association, states that the property no longer belongs to the Association by virtue of the December 1985 final judgment of dissolution of marriage.

Hall avers that at the November 3, 1988, meeting with O'Neil, the plaintiffs told O'Neil the deed to the property would be changed once the divorce litigation was over. However, O'Neil insisted on issuing the building permit in the Association's name since that name was on the notice of condemnation. O'Neil also suggested that the "condemned" sign remain posted on the property to discourage trespassing.

The affidavit states that O'Neil never gave the plaintiffs any condemnation notice during meeting, did not offer any written

guidelines for the repairs, did not inform the plaintiffs of the appeal process, or give notice of the September 1989 demolition. However, O'Neil did state that the building was structurally strong, would not take much work to meet the code, and would help ease the housing shortage in east Stuart.

Hall continues by stating that he changed the Jensen Beach address for the Association in July 1987; mail sent to that address after July 1988 would have been returned undelivered.

Hall has never been shown the actual return receipt card, in spite of requests to produce it (Exhibits N and O). The copy he was shown at O'Neil's deposition had several numbers cut off at the edge of the paper and is not the copy attached to the defendant's motion for summary judgment.

Finally, Hall states that he has

photographs of properties belonging to others in Stuart, such as Woodman Hall, which demonstrate that the plaintiffs are victims of racial discrimination.

RECOMMENDATIONS OF LAW

Title 42 U.S.C. §1983 establishes the right of a person to pursue a civil action based on deprivation of federally protected rights. The two essential elements to a §1983 action are: (1) the conduct complained of must have been committed by a person acting under color of state law; and (2) the conduct must have deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). The evidence must be viewed in the light most favorable to the non-moving party. Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987).

1. Capacity To Be Sued

The defendant contends that the only proper defendant to this action is the City of Stuart, a municipal corporation, which has been named as a defendant. The named defendant City of Stuart, Florida Building and Code Enforcement, claims it is not an entity capable of being sued.

Pursuant to Rule 17(b), Fed.R.Civ.P., the capacity of a corporate entity to be sued is determined by state law. In Florida a municipal corporation's capacity to sue and be

sued is governed by the Municipal Home Rule Powers Act, which provides municipalities with "the broad exercise of home rule powers granted by the constitution." Fla.Stat. §166.021. The Florida Constitution permits the exercise of "any power for municipal purposes except as otherwise provided by law." Fla.Constitution, Art. 8, §2(b).

Florida courts interpret this grant to mean that "[a]utonomous bodies of government have the power to either bring suit or be sued." Miami v. Rodriguez-Quesada court found that non-autonomous city boards did not have the capacity to sue or be sued.

The defendant provided the affidavit of the City Manager which avers that the only governmental entity is the City of Stuart; there is no separate entity known as the City of Stuart, Florida Building and Code Enforcement. All building and code

enforcement functions are performed by City of Stuart employees.

The plaintiffs provided the telephone listing for City of Stuart, Code Enforcement Board. However, a telephone directory listing does not define or affect the governmental entity properly created pursuant to Florida statutes. The listing clearly is meant to help citizens direct their inquires to the proper city employee.

The evidence is unrefuted that the only proper defendant is the City of Stuart.

However, prior to the motion for summary judgment, the defendant filed a motion to quash service, an answer, witness lists and various motions in the name of the City of Stuart Code Enforcement Board. Neither of the first two pleadings assert that the complaint or the amended complaint names a defendant which lacks the capacity to be sued. The

argument does not arise from evidence obtained during discovery; it is now asserted a year after the action was initiated, after a trial date has been set.

Rule 9(a), Fed.R.Civ.P., requires a party wishing to raise the defense of the capacity of an entity to be sued shall file "a specific negative averment." The Court must consider whether the defense of lack of capacity is waived if not asserted at the outset of the lawsuit. This analysis requires a determination of the nature of the defense according to state law, and then ascertaining when it must be raised under the Federal Rules of Civil Procedure. Morgan Guaranty Trust Co. v. Blum, 649 F.2d 342, 345 (5th Cir. 1981) (the Eleventh Circuit adopted as precedent the rulings of the Fifth Circuit decided prior to September 30, 1981. Bonner v. Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981)).

Fla.R.Civ.P.1.120(a) also provides that the defense of lack of capacity to be sued must be made by specific negative averment. In Florida courts, the defense must be raised in the answer or a motion to dismiss. Keehn v. Joseph C. Mackey & Co., 420 So.2d 398, 399, n. 1 (Fla. 4th DCA 1982), citing Whittington Condominium Apts. Inc. v. Braemer Corp., 313 So.2d 463 (Fla. 4th DCA 1975).

Federal Rule 9(a) requires the same procedure. In this Circuit, lack of capacity to be sued may be waived if not appropriately raised in a responsive pleading. Morgan, supra, 649 F.2d at 345, citing 5 Wright and Miller, Federal Practice and Procedure, §1295 (1965).

Accordingly, the Court should deny the defendant's motion for summary judgment based on lack of capacity to be sued.

2. Real Parties In Interest

The defendant contends only the owner of record for real property can file a lawsuit regarding the destruction of that property. The October 16, 1990, affidavit from the Palm Beach Title Service states that the owner of record of the property is the Hedge Highway Evangelistic Association, Inc. The affidavit does not mention any recorded mortgage.

Plaintiff Cook claims to be the owner of the property and plaintiff Hall claims to be the mortgagee of the property.

The owner of the property has standing to file a lawsuit in federal court. Walker v. United States, 428 F.2d 1229, 1233 (C. Cl. 1970). The plaintiffs' exhibits show that on February 18, 1985, plaintiff Cook conveyed the property by quitclaim deed to the Association. The quitclaim deed was voided by the final judgment of divorce issued December 10, 1985,

and plaintiff Cook was awarded exclusive possession of that property. On October 9, 1987, the Fourth District Court of Appeals reversed the judgment insofar as it set aside the quitclaim deed. The quitclaim deed was restored to full effect; the property reverted to ownership by the Association. The plaintiffs' and defendant's evidence shows Cook has no individual ownership interest in the property.

The Court notes that Cook is a Bishop in the Association, but nothing in the complaint or exhibits suggests that Cook is suing on behalf of the Association. Moreover, the current complaint is filed pro se; the Association must be represented by an attorney in district court. Palazzo v. Gulf Oil Corp., 764 F.2d 1381 (11th Cir. 1985), cert. denied, 474 U.S. 1058 (1986).

Accordingly, Cook has no interest in the

property, either as an individual owner or as an agent of the corporation, and cannot be a plaintiff in this action.

Next, the Court will consider Hall's standing. A mortgagee has an interest in real property and may file a lawsuit to recover damages for destruction of the property. Allstate Finance Corp. v. Zimmerman, 272 F.2d 323, 325 (5th Cir. 1959), citing Atlantic Coast Line Railway Co. v. Rutledge, 165 So.2d 563 (Fla. 1935).

On February 11, 1985, before the property was quitclaimed to the Association, Cook signed a note and mortgage on the property which named Hall as the mortgagee. The mortgage was recorded in the record books of Martin County on February 12, 1985. Although the final judgment of divorce voided the mortgage, the court of appeal reversed that part of the judgment, thereby reinstating the

mortgage. The defendant provided no evidence challenging the recorded mortgage.

Because Hall, as mortgagee, has a legally enforceable interest in the property, the Court should not grant the defendant's motion for summary judgment based upon lack of a real party in interest.

3. No Showing Of Municipal Custom Or Policy

Municipal liability can be asserted if the plaintiffs demonstrate that the injury was caused by the official custom or practice of municipality. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). An isolated improper act by a municipal employee does not demonstrate municipal custom or policy as required by Monell, unless the single act is the product of an existing unconstitutional policy. Oklahoma City v. Tuttle, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 2436 (1985).

Municipal policy may be created by the

act of the legislative body, by widespread practice so permanent and well-settled as to constitute a custom, or by an official with the authority to make final decision for the municipality. Bannum v. Fort Lauderdale, 901 F.2d 989 (11th Cir. 1990).

The amended complaint does not allege a custom or policy of destruction of property without notice or for racial motives. Although the amended complaint contains a conclusory allegation of conspiracy, mere use of the word does not show policy or custom.

The defendant has provided a copy of the Stuart Code which states that condemnation may proceed only with notice to certain individuals or the posting of notice on the property. The factors to be considered in condemnation are listed in the regulations; the race of the owner is not among them. The affidavits of the City Commission members and

the City Manager state that condemnation is performed in accordance with the regulations; no other policy or custom is in effect. Property is not condemned without notice or for racial reasons.

O'Neil's deposition states that he issued the condemnation notice based on the condition of the structure. The deficiencies were listed on the condemnation notice. He avers that the plaintiffs had actual notice of the condemnation, since the sign posted on the property caused them to come to his office, where he showed them another copy of the notice and discussed the application for the building permit with them.

O'Neil also testified that in September 1989, few repairs had been made and demolition was scheduled. Notice of demolition is not required by the City code, but notice may have been sent to the owner of record, the

Association.

The plaintiffs offer their affidavits which state that they have photographs of the Woodman Hall Building and other proofs which demonstrate that the plaintiffs were the victims of racial discrimination. No photographs and no other proofs were submitted to the Court.

There is no issue of material fact regarding this issue; the plaintiffs have failed to allege facts or to provide evidence of a municipal policy of condemnation and demolition of property without notice and for racial motives. The defendant's motion for summary judgment should be granted since there is no showing that unconstitutional municipal policy caused the damage to the property.

4. Applicability of §1983 To Pecuniary Claims

Count I alleges the taking of property without due process. The defendant contends

that no property loss capable of measurement in monetary terms can form the basis for a civil rights action. However, civil rights law related to property rights is more complex than the defendant suggests in its memorandum.

A complaint which alleges the taking of property associated with realty without notice pursuant to established governmental procedures may state a civil rights violation even if there is a post-deprivation state law remedy. Evers v. Custer, 745 F.2d 1196, 1202, n. 6 (9th Cir. 1984). Established procedures may be found in city codes or in the decisions of the official with final authority in such matters. Burtnicks v. New York, 716 F.2d 982, 988 (2d Cir. 1983).

The defendant also contends that even if the plaintiffs may have a claim under the civil rights statute, the matter is not ripe for federal review because the plaintiffs

failed to exhaust their state remedies when they chose not to appeal the original condemnation in October 1988. The defendant cites Doody v. Tudor, 864 F.2d 1475 (9th Cir. 1989).

The Doody court, in an amended opinion, held that while a Fifth Amendment claim for taking of property without just compensation required exhaustion of state law remedies, a Fourteenth Amendment claim of taking property without due process was not similarly barred once the governmental entity had made a final decision to take the property. Sinaloa Lake Owners Ass'n. v. Simi Valley, 882 F.2d 1398, 1404 (9th Cir. 1989). Accordingly, the Court should deny the defendant's motion for summary judgment on Count I for failure to state a civil rights claim ripe for federal review.

5. Due Process

The due process required before private

property can be demolished depends on the surrounding facts. The owner must have an opportunity to be heard before the destruction of property unless there is a strong governmental interest which mandates immediate action, such as an imminent, serious threat to public safety. Burtnicks, supra, 716 F.2d at 987; Lakeland v. Bunch, 239 So.2d 66 (Fla. 1974).

The defendant contends the plaintiffs received all the due process required by the Stuart Code, including notice and an opportunity to be heard. The notice was provided first by certified mail as evidenced by the signed return receipt and second by the November 3, 1988, meeting between the plaintiffs and O'Neil.

There is no issue of material fact that the plaintiffs had actual notice the property was condemned, even if they did not receive

mailed notice.

The Stuart Code provides two alternatives to the owner of condemned property who wishes to avoid demolition, either an appeal or an application for a building permit for necessary repairs. The plaintiffs applied for and received a building permit.

The Constitution does not require a building permit to extend indefinitely, particularly when the permit states that if work is abandoned for six months, the permit will expire. Spence v. Zimmerman, 873 F.2d 256, 260-61 (11th Cir. 1989). The instant building permit was issued October 3, 1988, and contained a six-month expiration warning. The plaintiffs' unrebutted evidence shows that nothing was doe to the property after the window bars were installed in November 1988, even though the property was still unsafe.

Although the plaintiffs obtained a building permit, they aver that they were never told of the right to appeal or the possibility of demolition; they contend they were deprived of due process.

Due process requires notice and a meaningful hearing. Sinaloa Lake Owners Ass'n, supra, 882 F.2d at 1405. The plaintiffs make no claim of special disability such as lack of fluency in English. Considering all the evidence before the Court, there is no issue of material fact that the plaintiffs had notice of the condemnation, conferred with the Building Department, and received a time-limited permit for repairs. Based on the last documented repair, the permit lapsed in May 1989, with the building still unsafe. The demolition occurred in September 1989.

There also is no issue of material fact

that the building had multiple code defects when condemned and when demolished. The plaintiffs do not claim that the building had no code violations and was improperly condemned.

Their only argument is that O'Neil did not warn them or notify them of the demolition. Separate notice of the demolition is not required by the Stuart Code, since demolition is only one step of the condemnation process. Clearly the plaintiffs had notice of that process, a chance to be heard and an opportunity to correct the code violations. The plaintiffs received all the due notice required by the Stuart Code and by the Constitution.

Therefore the Court should grant the defendant's motion for summary judgment on Count I because there is no showing of a lack of due process.

6. Racial Discrimination

Count II of the amended complaint alleges a racially-motivated conspiracy to destroy the property. At the summary judgment stage, the plaintiffs cannot rely on the bare allegations of conspiracy, but must provide evidence to support the claim. Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir. 1986). "To establish a prima facie case of conspiracy to violate rights protected by §1983, a plaintiff must demonstrate that the defendants 'reached an understanding to violate [his] rights.'" Strength v. Hubert, 854 F.2d 421, 425 (11th Cir. 1988)(citations omitted), reh. den., 860 F.2d 1092 (1988).

Nothing in the complaint or in the plaintiffs' response to the motion for summary judgment identifies the alleged co-conspirators or shows any evidence of express or implied agreement to violate the

plaintiffs' civil rights.

However, discriminatory acts may be performed in the absence of a conspiracy. Racial discrimination may be based on laws that are discriminatory on their face or are enforced in a discriminatory manner. Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 401 (1944). It is undisputed that the condemnation regulation is not discriminatory on its face.

"The equal protection clause 'is essentially a direction that persons similarly situated should be treated alike.'" Spence, supra, 873 F.2d at 261 (citations omitted). During summary judgment, the plaintiffs must offer evidence that others similarly situated were treated more favorably. Id.

The plaintiffs' evidence of the treatment afforded other owners of condemned property consists of (1) a receipt for certified mail

to an addressee in Whitestone, New York; (2) a copy of the notice of condemnation sent to that same address regarding the Stuart property known as the Woodman Hall Building, showing code violations in six of the ten categories, and (3) Hall's affidavit stating he has photographs of the Woodman Hall Building which demonstrate that the plaintiffs are the victims of discrimination. The condemnation notice for the Woodman Hall Building was prepared July 10, 1989; during O'Neil's deposition on August 1, 1990, Hall suggests the building was still standing. The memorandum of law alleges the building was still standing in November 1990, but there is no evidence of this.

Nothing in this evidence indicates the race of the owners of the Woodman Hall Building, or that the buildings were similarly situated with respect to the building code

violations or what efforts were made to remedy those violations. The plaintiffs have failed to show discriminatory treatment.

Accordingly, the Court should grant the defendant's motion for summary judgment on Count II because the plaintiffs have not provided any evidence of conspiracy to violate their civil rights or any evidence of racial discrimination.

CONCLUSION

The Court has reviewed carefully the complaint and the applicable law, and being fully advised in the premiss, it is hereby

RECOMMENDED that the Court should grant the defendant's motion for summary judgment because, in response to the defendant's evidence, the plaintiffs have offered no evidence of any municipal policy or custom which violated their civil rights. Additionally, the plaintiffs have not provided

any evidence of denial of due process to support their claim in Count I and have not provided any evidence of racial discrimination to support their claim in Count II.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with The Honorable Jose A. Gonzalez, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal factual findings contained herein. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982) (en banc).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 27th day of March, 1991.

UNITED STATES MAGISTRATE JUDGE
LURANA S. SNOW

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